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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

PAUL P. KIRWAN,

Defendant and Appellant.

A133828

(San Mateo County
Super. Ct. No. SC073555A)

Appellant Paul P. Kirwan appeals from the judgment entered after a jury convicted him of carjacking, assault with a deadly weapon (an automobile), driving under the influence of alcohol, driving with 0.08 percent or more blood alcohol, and misdemeanor hit and run. (Pen. Code, §§ 215 subd. (a), 245, subd. (a)(1); Veh. Code, §§ 23152, subd. (a), 23152, subd. (b), 20002, subd. (a).)¹ Appellant, who was on parole at the time of these crimes, was sentenced to a total prison term of eight years and eight months and ordered to pay various fines, fees and assessments. Appellant's counsel has filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 and *People v. Kelly* (2006) 40 Cal.4th 106, requesting that we conduct an independent review of the entire record on appeal. Having done so, we affirm the judgment.

¹ Unless otherwise stated, all further statutory references herein are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

On June 1, 2011, an information was filed charging appellant with the following crimes: carjacking (§ 215, subd. (a)) (count one); assault with a deadly weapon (an automobile) (§ 245, subd. (a)(1)) (count two); driving under the influence of alcohol causing bodily injury (Veh. Code, § 23153, subd. (a)) (count three); driving with 0.08 percent or more blood alcohol causing bodily injury (Veh. Code, § 23153, subd. (b)) (count four); hit and run causing injury to another (Veh. Code, § 20001, subd. (a)) (count five); possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)) (count six); and misdemeanor hit and run (Veh. Code, § 20002, subd. (a)) (count seven).

With respect to counts one and two, the information alleged the felony offenses were serious (§ 1192.7, subd. (c)(23), (27)), violent (§ 667.6, subd. (c)(17)) (count one only), and committed while appellant was on parole (§ 1203.085, subd. (b)). With respects to counts three and four, the information alleged the offenses occurred within 10 years of appellant's felony conviction under Vehicle Code section 23152 (Veh. Code, § 23550.5, subd. (a)(1)), and within 10 years of his three prior convictions under Vehicle Code section 23152. In addition, the information alleged for purposes of counts one through six that appellant had suffered three prior felony convictions (§ 1203, subd. (e)(4)) and two prior prison terms (§ 667.5, subd. (b)).

A jury trial began September 20, 2011, at which the following evidence was heard. On March 31, 2011, Eun Young Lee was walking from the elevator to the parking garage in the basement level of her office building in San Mateo. As Lee exited the elevator, she noticed a man smoking underneath a no-smoking sign while talking loudly and angrily into a cell phone. Lee just briefly saw the man's face in the dimly lit parking garage as she walked about 30 feet to where her Hyundai car was parked. Once there, Lee heard a voice behind her saying: "Excuse me, ma'am. Can I have your car?" Lee turned around to find the man from outside the elevator, whom

she described as Caucasian with short hair and a tattoo on his left upper arm. The man again asked for her car.

At this point, Lee, who was already in her car, responded: “No,” but the man began yelling and grabbed the door. Lee tried to run, but the man gave chase, eventually grabbing her from behind and pushing her down. In this fall, Lee injured her collarbone and ankle. Scared, Lee gave the man her car keys, which he took, driving away so quickly the tires squealed.

After calling 911, Lee walked up the parking garage ramp and found her car in the middle of the street with damage to the trunk and bumper. On the front seat was a cell phone that did not belong to her, which was later linked to appellant by DNA testing and by two phone numbers he provided to police during booking. Appellant’s DNA was also later found on her car’s gearshift. At trial, Lee identified appellant with 90 percent certainty as the man who stole her car.

Also on March 31, 2011, Sushila Kumar, who worked in the same office building as Lee, was exiting the parking garage in her car about 2:45 p.m. A car travelling the wrong direction forcefully rammed into Kumar’s car with its front end. After continuing to push Kumar’s car for about 60 seconds, the driver then reversed and rammed into her car again with less force. Following this collision, Kumar turned off the engine, exited her car, and hid behind the ticket booth. Meanwhile, the other driver continued to back up, this time driving backward through a closed roll-up gate. The car then became disabled, coming to a stop in the middle of the street.

Once the car became disabled, several witnesses saw the driver exit the car and run into nearby bushes.² A short time later, police found appellant in these bushes displaying several signs of intoxication, including slurred speech and odorous breath. His intoxication was confirmed by a blood sample taken about two hours later, testing on which revealed a blood alcohol level of 0.18 percent.

² Among those who witnessed the collision between Kumar and appellant was a building manager, who later identified appellant as the driver in a field show-up.

Officers searched appellant at the scene before taking him to jail, finding no contraband. However, during the booking process, they found a usable amount of cocaine in his right front pants pockets. The booking process was monitored by a surveillance camera; however, the police failed to properly preserve the videotape and failed to provide a copy to the defense before expiration of the tape retention period.

On October 4, 2011, the jury found appellant guilty of carjacking (count one), assault with a deadly weapon (to wit, an automobile) (count two), driving under the influence of alcohol (a lesser included offense of count three as originally pled), driving with 0.08 percent or more blood alcohol (a lesser included offense of count four as originally pled), misdemeanor hit and run (a lesser included offense of count five as originally pled), and misdemeanor hit and run (count seven). The jury found appellant not guilty of possession of a controlled substance (count six).

Following appellant's waiver of the right to a jury trial on the special allegations, the trial court found true that count one was a serious and violent felony offense committed while appellant was on parole, that count two was a serious felony offense committed while appellant was on parole, that counts three and four were committed within 10 years of appellant's prior felony DUI conviction and within 10 years of three or more prior DUI convictions, and that appellant had suffered three prior felony convictions and two prior prison terms. The trial court then sentenced appellant to a total of eight years and eight months in prison, consisting of the five-year middle term for carjacking, a consecutive one-year term (1/3 the middle term of three years) for assault with a deadly weapon, a consecutive eight-month term (1/3 the middle term of two years) for driving under the influence with priors, and a consecutive two-year term for the two prison priors. The court also ordered appellant to pay an \$800 restitution fine, a \$160 court security fee and a \$120 criminal conviction assessment.

The trial court stayed the two-year middle term for driving with 0.08 percent or more blood alcohol, but imposed a concurrent six-month jail term on the two

misdemeanor hit and run counts and ordered appellant to pay an \$80 court security fee and \$60 criminal conviction assessment.

Lastly, the trial court ordered appellant to pay restitution to the victims in the amount of \$16,460.14 to the property management company for garage damage, \$11,297.78 to Lee, and an amount to be determined to Kumar. This timely appeal followed.

DISCUSSION

As we previously stated, appellant's appointed counsel has filed an opening brief setting forth the material facts, but raising no issue for our consideration. Counsel requests that we independently review the record to decide whether there exists any nonfrivolous issue for appeal. (*People v. Wende, supra*, 25 Cal.3d 436; *People v. Kelly, supra*, 40 Cal.4th 106.) Counsel has also attested that appellant was advised of his right to file a supplemental brief with this court. Appellant has not filed a supplemental brief.

After a careful independent review of this record, we agree with appellant's counsel that there are no reasonably arguable legal or factual issues for our consideration. Appellant, represented by competent counsel, was found guilty by a jury of carjacking, assault with a deadly weapon (an automobile), driving under the influence of alcohol, driving with 0.08 percent or more blood alcohol, and two counts of misdemeanor hit and run. (§§ 215 subd. (a), 245, subd. (a)(1); Veh. Code, §§ 23152, subd. (a), 23152, subd. (b), 20002, subd. (a).) Driving under the influence of alcohol, driving with 0.08 percent or more blood alcohol, and one count of misdemeanor hit and run were all lesser included offenses. In addition, appellant was found not guilty of possession of a controlled substance. (Health & Saf., § 11350, subd. (a).) The jury's findings were adequately supported by the evidence offered at trial, including his identification as the assailant by Lee and the building manager, testimony from Lee regarding his forcible taking of her vehicle and by Kumar regarding his ramming of her vehicle multiple times with Lee's vehicle, his DNA

found on the gearshift of Lee's car, the recovery of his cell phone from Lee's vehicle, his discovery by police shortly after the crimes in nearby bushes in an intoxicated state, and his 0.18 percent blood alcohol level confirmed by blood testing within hours of the crimes.

Following a bench trial, the trial court found true the following enhancements: (1) the carjacking offense was a serious (§ 1192.7(c)(27)) and violent (§ 667.5(c)(17)) felony committed while appellant was on parole (§ 1203.085, subd. (b)); (2) the assault with a deadly weapon offense was a serious felony (§ 1192.7(c)(23)) committed while appellant was on parole (§ 1203.085, subd. (b)); (3) the offenses of driving under the influence of alcohol and driving with 0.08 percent or more blood alcohol were committed within 10 years of appellant's felony DUI conviction and within 10 years of three or more of his other DUI convictions (Veh. Code, §§ 23550.5, subd. (a)(1), 23550); (4) and appellant had suffered three prior felony convictions and two prior prison terms (§§ 1203, subd. (e)(4), 667.5, subd. (b)). Again, these findings were adequately supported by the record, including his past police records and the above stated evidence of the serious and/or violent nature of his offenses.

Finally, the trial court sentenced appellant to a total of eight years and eight months in prison, consisting of the five-year middle term for carjacking, a consecutive one-year term (1/3 the middle term of three years) for assault with a deadly weapon, a consecutive eight-month term (1/3 the middle term of two years) for driving under the influence with priors, and a consecutive two-year term for the two prison priors. Appellant received 218 days of credit for time served and 32 days of conduct credit. The court also ordered appellant to pay an \$800 restitution fine (§ 1202.4, subd. (b)), an \$800 parole violation fine to be suspended unless parole is revoked (§ 1202.45), a \$160 court security fee (§ 1465.8) and a \$120 criminal conviction assessment (Gov. Code, § 70373). Further, the court stayed sentencing with respect to the offense of driving with 0.08 percent or more blood alcohol (§ 654), but imposed a concurrent six-month jail term with respect to the two misdemeanor hit and run offenses, and ordered

appellant to pay an \$80 court security fee (§ 1465.8) and \$60 criminal conviction assessment (Gov. Code, § 70373). Lastly, the court ordered appellant to pay restitution to the California Victim Compensation and Government Claims Board (§ 1202.4, subd. (f)).³ The sentence, fees and fines, which were not challenged by appellant during trial, were lawful. (§ 1170, § 1203.085, subd. (b); Cal. Rules of Court, rules 4.420, 4.425, 4.414(b)(2); see also *People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1072 [defendants cannot complain for the first time on appeal regarding the propriety of restitution fines].)

Thus, having ensured appellant received adequate and effective appellate review, we affirm the trial court's judgment. (*People v. Wende, supra*, 25 Cal.3d at pp. 441-442; *People v. Kelly, supra*, 40 Cal.4th at pp. 112-113.)

DISPOSITION

The judgment is affirmed.

Jenkins, J.

We concur:

McGuiness, P. J.

Siggins, J.

³ The amount of restitution to the victims was determined as follows: (1) \$16,460.14 payable to ACCO Management Company to compensate for the garage damage, (2) \$11,297.78 payable to Lee for her physical injuries, counseling and wage loss, (3) and an amount to be determined to compensate Kumar.